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No. 84-1273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,

v.

SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Does the Eleventh Amendment, as construed by a line of decisions culminating in this Court's decision in *Pennhurst State School and Hospital* v. *Halderman,* bar the federal courts from ordering state universities to administer examination retests to students from other states who have been determined to be academically unqualified?

II. Is a state medical school's procedurally correct dismissal of an academically deficient student subject to substantive due process review and reversal by the federal courts?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .. 2

STATEMENT OF THE CASE 2

A. The Inteflex Program 3

B. Ewing's Academic Record 5

C. The NBME Part I Examination 9

D. Retests on the NBME Part I Examination 11

E. The Inteflex Faculty Board's Decision To Dismiss Ewing From Registration 12

F. The Proceedings Below 15

SUMMARY OF ARGUMENT 16

ARGUMENT 18

I. THE SIXTH CIRCUIT'S INJUNCTIVE ORDER IS AGAINST THE STATE OF MICHIGAN ITSELF, IS BARRED BY THE ELEVENTH AMENDMENT, AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *Pennhurst State School and Hospital* v. *Halderman* 18

A. Respondent Ewing's Claim Is Against The State Of Michigan And Petitioner Timely Interposed The Bar Of The Eleventh Amendment As An Affirmative Defense And Did Not Waive Its Eleventh Amendment Immunity 18

TABLE OF CONTENTS continued

Page

B. The Eleventh Amendment Bars Both Legal and Equitable Relief In This Case 20

C. The Lower Court's Injunction Illustrates The Timeless Purpose Of The Eleventh Amendment 21

D. Respondent's Complaint Could Have Been Handled Competently By The Michigan State Courts 23

II. FEDERAL COURTS SHOULD NOT SUBSTANTIVELY REVIEW AND REVERSE THE ACADEMIC DECISIONS OF PROFESSIONAL EDUCATORS UNDER 42 U.S.C. § 1983 .. 24

A. The Sixth Circuit's Order Is An Unwarranted Intrusion Into Academic Decisionmaking 24

B. Judicial Deference To Academic Decisions Has Long Been Recognized 25

1. Academic freedom rests on the ability of professional educators to exercise good faith discretion 26

2. Federal intrusion into a domain historically the province of state authorities undermines historic principles of federalism 30

3. The costs of federal oversight of academic decisions outweigh any short term benefits . 31

C. Failure To Give A Student Remedial Opportunities Offered Other Students Does Not By Itself Amount To An Arbitrary And Capricious Denial Of Substantive Due Process 33

1. Where a medical faculty's decision to dismiss an academically deficient student has been carefully and deliberately considered, its substance necessarily must be presumed correct 33

TABLE OF CONTENTS continued

Page

2. The standard of review adopted by the Sixth Circuit, if not inappropriate entirely, was incorrectly applied 37

3. Civil Rights legislation was never intended and should not be used to give the federal courts jurisdiction over traditional state law contract claims 43

D. Judicial Review Of The Substance Of Academic Decisions Is Not Wise Policy 46

CONCLUSION 48

TABLE OF AUTHORITIES

CASES: Page

Alabama v. *Pugh*, 438 U.S. 781 (1978) 21

Anderson v. *Banks*, 520 F.Supp. 472 (S.D. Ga. 1981) ... 35

Attorney General v. *Regents of the University*, 30 Mich. 472 (1874) 21

Aubuchon v. *Olsen*, 467 F.Supp. 568 (E.D. Mo. 1979) 34, 38, 42

Barnard v. *Inhabitants of Shelburne*, 216 Mass. 19, 102 N.E. 1095 (1913) 24, 41

Bates v. *Sponberg*, 547 F.2d 325 (6th Cir. 1976) 44

Bauza v. *Morales Carrion*, 578 F.2d 447 (1st Cir. 1978). 44

Bishop v. *Wood*, 426 U.S. 341 (1976) 43

Bleicker v. *Board of Trustees of Ohio State University*, 485 F.Supp. 1381 (S.D. Ohio 1980) 32, 41

Board of Curators of the University of Missouri v. *Horowitz*, 435 U.S. 78 (1978) 25, 33, 39, 41, 44, 47

Board of Education of the Hendrick Hudson Central School District v. *Rowley*, 458 U.S. 176 (1982) 25, 30-31

Board of Regents v. *Roth*, 408 U.S. 564 (1972) 39, 41

Board of Regents of the University of Michigan v. *Auditor General*, 167 Mich. 444, 132 N.W. 1037 (1911). 18

Bonner v. *Circuit Court of the City of St. Louis*, 526 F.2d 1331 (8th Cir. 1975), *cert. den.* 424 U.S. 946, *reh. den.* 425 U.S. 926 (1976) 24

Booker v. *Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909) 40

Connecticut Board of Pardons v. *Dumschat*, 452 U.S. 458 (1981) 44, 45

Connelly v. *University of Vermont*, 244 F.Supp. 156 (D. Vt. 1965) 42

TABLE OF AUTHORITIES—continued

	Page
Cory v. *White*, 457 U.S. 85 (1982)	20
Depperman v. *University of Kentucky*, 371 F.Supp. 73 (E.D. Ky. 1974)	41
Dietz v. *American Dental Association*, 479 F.Supp. 554 (E.D. Mich. 1979)	23
Doe v. *New York University*, 666 F.2d 776 (2d Cir. 1981)	27
Dunlop v. *Bachowski*, 421 U.S. 560 (1975)	42
East Jackson Public Schools v. *Michigan*, 133 Mich. App. 132, 378 N.W.2d 303 (1984)	39
Edelman v. *Jordan*, 415 U.S. 662 *reh. den.* 416 U.S. 1000 (1974)	20, 21
Edwards v. *Board of Regents of Northwest Missouri State University*, 397 F.Supp. 822 (W.D. Mo. 1975)	44
Epperson v. *Arkansas*, 393 U.S. 97 (1968)	25, 30
Essigman v. *Western New England College*, 419 N.E.2d 1047 (Mass. App. 1981)	24
Ex Parte Young, 209 U.S. 123 (1908)	20
Falk v. *State Bar of Michigan*, 411 Mich. 63, 305 N.W. 2d 201 (1981)	39
Ford Motor Co. v. *Department of Treasury of Indiana*, 323 U.S. 459 (1945)	20
Frank v. *Marquette University*, 209 Wis. 372, 245 N.W. 125 (1932)	24
Gaspar v. *Bruton*, 513 F.2d 843 (10th Cir. 1975)	34. 38, 39, 41, 42
Goss v. *Lopez*, 410 U.S. 565 (1975)	41
Governor v. *State Treasurer*, 390 Mich. 389, 212 N.W. 2d 711 (1973)	39

TABLE OF AUTHORITIES—continued

	Page
Greenhill v. *Bailey*, 519 F.2d 5 (8th Cir. 1975)	34
Hall v. *Medical College of Ohio at Toledo*, 741 F.2d 299 (6th Cir. 1984)	21
Hall v. *University of Minnesota*, 530 F.Supp. 104 (D. Minn. 1982)	36
Healy v. *James*, 408 U.S. 169 (1972)	26
Henson v. *Honor Committee of University of Virginia*, 719 F.2d 69 (4th Cir. 1983)	35, 37
Hill v. *Trustees of Indiana University*, 537 F.2d 248 (7th Cir. 1976)	44
Hines v. *Rinker*, 667 F.2d 699 (8th Cir. 1981)	34, 36, 38, 42
Hubbard v. *John Tyler Community College*, 455 F. Supp. 753 (E.D. Va. 1978)	34, 38
Jansen v. *Emory University*, 440 F.Supp. 1060 (N.D. Ga. 1977)	27, 41, 47
Jones v. *Board of Governors of University of North Carolina*, 557 F.Supp. 263 (W.D. N.C.) *aff'd* 704 F.2d 713 (4th Cir. 1983)	44
Kennedy v. *Mendoza-Martinez*, 372 U.S. 144 (1963)	48
Keyishian v. *Board of Regents of New York*, 385 U.S. 589 (1967)	26
Keys v. *Sawyer*, 353 F.Supp. 936 (S.D. Tex. 1973)	37
Kohler v. *Hirst*, 460 F.Supp. 412 (E.D. Va. 1978)	47
Lavash v. *Kountze*, 604 F.2d 103 (1st Cir. 1979)	32
In re Levy, 88 A.D. 915, 450 N.Y.S.2d 574 (1982)	24
MacDonald v. *Board of Regents of the University of Michigan*, 371 F.2d 818 (6th Cir. 1967)	20
Maitland v. *Wayne State University*, 76 Mich. App. 631, 257 N.W.2d 200 (1977)	23, 24

TABLE OF AUTHORITIES continued

Page

Mahavongsanan v. *Hall*, 529 F.2d 448 (5th Cir. 1976) . 27, 44

Marquez v. *University of Washington*, 648 P.2d 94 (Wash. App. 1982) 40

McElearney v. *University of Illinois*, 612 F.2d 285 (7th Cir. 1979) 35, 36

McIntosch v. *Borough of Manhattan Community College*, 55 N.Y.2d 913, 433 N.E.2d 1274 (1982) 24

Neel v. *Indiana University*, 435 N.E.2d 607 (Ind. App. 1982) 24

Nelles v. *Superintendent of Public Instruction*, 5 Mich. App. 47, 145 N.W.2d 795 (1966), *lv. app. den.* 378 Mich. 748, *cert. den.* 389 U.S. 9 (1967) 39

Pennhurst State School and Hospital v. *Halderman*, —— U.S. ——, 104 S.Ct. 900 (1984) 17, 21

People v. *Phippen*, 70 Mich. 6, 37 N.W. 888 (1888) .. 22, 39

People v. *Regents of the University*, 18 Mich. 469 (1869) 21

People Ex Rel. Drake v. *Regents of the University of Michigan*, 4 Mich. 98 (1856) 21

Perry v. *Sindermann*, 408 U.S. 593 (1972) 39, 40

Pullman-Standard v. *Swint*, 456 U.S. 273 (1982) 45

Quern v. *Jordan*, 440 U.S. 332 (1979) 21

Regents of the University of Michigan v. *State*, 395 Mich. 52, 235 N.W.2d 1 (1975) 18

Regents of the University of Michigan v. *Michigan Employment Relations Commission*, 389 Mich. 96, 204 N.W.2d 218 (1973) 18

Ross v. *Pennsylvania State University*, 445 F.Supp. 147 (M.D. Pa. 1978) 36

TABLE OF AUTHORITIES continued

Page

St. Louis Developmental Disabilities Treatment Center Parents Ass'n. v. *Mallory*, 591 F.Supp. 1416 (W.D. Mo. 1984) 38

San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973) 25, 31

Sanders v. *Ajir*, 555 F.Supp. 240 (W.D. Wis. 1983) ... 36

Slaughter v. *Brigham Young University*, 514 F.2d 622 (10th Cir.), *cert. den.* 423 U.S. 898 (1975) 35

Sofair v. *State University of New York*, 44 N.Y.2d 475, 377 N.E.2d 730 (1978) 24

Stebbins v. *Weaver*, 537 F.2d 939 (7th Cir.) *cert. den.* 429 U.S. 1041 (1976) 35

Sterling v. *Regents of the University of Michigan*, 110 Mich. 369, 68 N.W. 253 (1896) 18

Stevens v. *Hunt*, 646 F.2d 1168 (6th Cir. 1981) .. 34, 36, 38, 39, 40, 42

Stoller v. *College of Medicine*, 562 F.Supp. 403 (M.D. Pa. 1983), *aff'd* 727 F.2d 1101 (3d Cir. 1984) .. 34, 36, 38, 39, 42, 46

Sutton v. *Cadillac Area Public Schools*, 117 Mich. App. 38, 323 N.W.2d 582 (1982) 39

Sweezy v. *New Hampshire*, 354 U.S. 234 (1957) 25, 26

Tanner v. *Board of Trustees of the University of Illinois*, 121 Ill. App. 3d 139, 459 N.E.2d 324 (1984) ... 24

Tinker v. *Des Moines School Dist.*, 393 U.S. 503 (1969) . 25

University of California Regents v. *Bakke*, 438 U.S. 265 (1978) 25

Watson v. *University of South Alabama College of Medicine*, 463 F.Supp. 720 (S.D. Ala. 1979) .. 34, 36, 38, 42, 46

TABLE OF AUTHORITIES continued

Page

Wilkenfield v. *Powell*, 577 F.Supp. 579 (W.D. Tex. 1983) 44

Williams v. *Howard University*, 528 F.2d 658 (D.C. Cir.), *cert. den.* 429 U.S. 850 (1976) 38, 42

Winnick v. *Manning*, 460 F.2d 545 (2d Cir. 1972) 44

Youngberg v. *Romeo*, 457 U.S. 307 (1982) 27

CONSTITUTIONAL PROVISIONS:

Eleventh Amendment, United States Constitution . 2, 15, 16

Fourteenth Amendment, United States Constitution .. 2

Tenth Amendment, United States Constitution 30

Michigan Constitution, Article 8, Section 5 .....2, 18

STATUTES AND RULES:

42 U.S.C. § 1983 ..... 2, 15, 17, 24, 43, 45

28 U.S.C. § 1254(1) 2

TEXTBOOKS AND OTHER AUTHORITIES:

R. Cecil, *Textbook of Medicine* (J. Wyngaarden & L. Smith 16th ed. 1982) 23

Irby, Fantel, Milam and Schwartz, *Faculty Rights and Responsibilities in Evaluating and Dismissing Medical Students*, J.Coll. & Univ.Law 102 (Spring 1981) 30

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. at 28a-33a)[1] is reported at 742 F.2d 913. The opinions of the District Court are reported at 552 F.Supp. 881 (Pet. App. at 4a-11a) and 559 F.Supp. 791 (Pet. App.

[1] Record references (Tr. I, II or III, Suppl. Tr., PX and DX) are to volumes I, II or III of the trial transcript, the supplemental trial transcript of closing arguments, plaintiff's trial exhibits and defendant's trial exhibits, respectively. Where appropriate, references are also made to those parts of the record reproduced in the Joint Appendix (J.A.) and the Appendix to the Petition for Certiorari (Pet. App.) filed with this Court.

at 12a-27a). Only the District Court's latter opinion was appealed to and reversed by the Sixth Circuit.

JURISDICTION

The judgment and opinion of the Court of Appeals were entered on September 6, 1984 (Pet. App. at 28a and 34a). A petition for rehearing *en banc* was denied on October 31, 1984 (Pet. App. at 35a). The petition for writ of certiorari, filed on January 30, 1985, was granted on March 25, 1985. Jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eleventh and Fourteenth Amendments to the Constitution of the United States, Section 1983 of Title 42 of the United States Code, and Section 5 of Article 8 of the Constitution of the State of Michigan, which are set forth in the appendix to the petition. Pet. App. at 2-3.

STATEMENT OF THE CASE

Respondent Scott Ewing's claim under 42 U.S.C. § 1983 challenges the unanimous committee decisions of petitioner's Medical School faculty to drop him from registration as a student in the school's special Inteflex program. Ewing contends that the faculty's decision, although based on an extensive and considered review of his entire academic performance and concededly fair on procedural grounds, violates his right to substantive due process merely because other students were allowed more than one opportunity to sit for a comprehensive examination while he was not. The Court of Appeals for the Sixth Circuit agreed with Ewing. It held that the faculty's professional assessment of Ewing's academic qualifications must yield to the court's mandate that Ewing be allowed to retake the comprehensive examination and, if he passes, be reinstated in the Medical School. Pet. App. at 33a.

A. The Inteflex Program

Respondent Scott Ewing first enrolled in the Medical School's Inteflex program in the fall of 1975. J.A. 14. The Inteflex program, open only to recent high school graduates, combined both undergraduate and medical courses of study into a rigorous six-year curriculum.[2] DX 35-40. The Medical School also offers a standard four-year M.D. program and a seven-year combined M.D./Ph.D. program for students who have already received a four-year baccalaureate degree. *Id.* Requirements for admission, curricula, and promotion standards differ among these various programs, so that Inteflex students are evaluated separately from other students. J.A. 36. According to Associate Dean for Education Affairs James A. Taren, M.D., Inteflex students were "a separate group", and comparing them academically with students in the standard program would be like "comparing apples with oranges." *Id.* At the time of Ewing's enrollment, Inteflex students took only one of their Phase I and Phase II academic courses with students from the standard program. Tr. I at 125.

The Inteflex program consists of three two-year phases, each of which a student must complete to the faculty's satisfaction before being allowed to progress to the next phase and to graduation. Tr. I at 146-147. Phase I of this curriculum includes undergraduate-level

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[2] Students currently enrolled in Inteflex pursue a seven-year program.

science and humanities courses, mostly prescribed but with some electives. Phase II primarily consists of basic medical science courses, but also includes some undergraduate-level courses as in Phase I. Phase III, in which Inteflex and standard students interact academically for the first time, is comprised of required and elective clerkships in a hospital setting. Students in all programs are required to pass a comprehensive examination of their basic biomedical knowledge, the National Board of Medical Examiners (NBME) Part I Examination, before they are allowed to enter this final clinical stage of their education. J.A. 72; Tr. I at 147, DX 35-40.

The academic performance of the Inteflex students is closely monitored and reviewed at regular intervals by the Inteflex Promotion and Review Board. DX 36 at 15. This board consists of approximately fifteen Inteflex faculty and course directors. J.A. 135. During the first two phases, it functions independently of the faculty boards which assess and monitor students in the other programs. J.A. 31-32. The Medical School bulletin in effect at the time Ewing first enrolled emphasized the faculty's reliance on this exercise of its collective academic judgment:

> The Promotion Boards can, at their discretion, approve advancement, require the student to repeat all or part of a year's work, refuse further registration, or take whatever action they may deem appropriate in an individual instance. [DX 36 at 34.]

The various faculty boards consider each student on an individual basis to assure that qualified students remain in registration. Tr. III at 281. Thus when a student encounters academic difficulty, his or her total

performance in the program, and not just the isolated problem area, is evaluated by the board during its deliberation and in its direction of remedial action. Tr. III at 196. However, while the circumstances of each student are often the subject of anguished concern, the faculty boards will if necessary fail those students who are not qualified to continue. Tr. III at 196-197.

More than six hundred medical doctors and Ph.D.s comprise the faculty of petitioner's Medical School but none has access to any student's docket [3] in the Dean's Office unless they also have membership on a Promotion and Review Board and are considering the academic records of a student in academic difficulty. Tr. III at 198. Thus, nearly all faculty members have no actual knowledge of how any of their students are doing in any other class. This serves as a check and balance against subtle or subconscious influence in grading. *Id.*

To further ensure the integrity of the decisionmaking process, students dissatisfied with action taken by a faculty board are provided with an appeal mechanism. A student may appeal any grade directly to the professor and may also petition a faculty board to reconsider its decision, and make a final appeal to the Medical School's Executive Committee. DX 36 at 34.

B. Ewing's Academic Record

Ewing's performance in the Inteflex program prior to his dismissal was characterized by multiple academic

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[3] The "docket" is the student's official file, which contains his or her high school, college and Medical School transcripts, all test scores, faculty evaluations, correspondence and so forth.

deficiencies and warnings. J.A. 126-128, 138-139; DX 14. Even though he was repeatedly invited by letter to meet with the Dean if he needed any assistance with his difficulties, Ewing acknowledged that he failed to do so. J.A. 143-146; Tr. III at 36-39. Indeed, Ewing freely admitted that he "wasn't bothered by it" when told that his performance was poor. Tr. III at 32.

As early as his first semester in the fall of 1975, Ewing expressed to a counselor his unhappiness with the University in general and the Inteflex program in particular. Tr. I at 238. That semester he received grades of incomplete in two of his courses. Tr. I at 238; DX 14. During the winter semester of 1976, Ewing enrolled in three courses for 11 credit hours, although the Inteflex curriculum prescribed four courses for 15 credit hours. Tr. I at 239-240, DX 14. Despite his reduced course load, he ended up withdrawing from one course and taking incomplete grades in the other two. Tr. I at 240-241, DX 14.

During the two terms which comprised Ewing's first year of study he completed only six of the eight required courses. Since four of the six courses were concluded belatedly, Ewing satisfied only one-fourth of his first-year coursework in the regular manner. J.A. 48. In May of 1976, the Inteflex faculty board, concerned with Ewing's poor performance, placed him on an irregular program. Tr. I at 241. Two months later the board granted him a leave of absence so that he could pursue other interests. J.A. 52; Tr. I at 243, Tr. III at 33, DX 3.

Ewing returned from his leave of absence for the winter term of 1977. For the next year and a half, while taking reduced course loads, he performed satisfactorily. Tr. II at 12-13, PX 6, DX 14. During this time

period, he was essentially taking only one required science course per term, as compared with the two or more taken concurrently per term by other Inteflex students.[4] J.A. 47. He was promoted to Phase II of the Inteflex Program at the close of the 1977-78 academic year. Tr. II at 14, DX 14.

The difficulties so characteristic of Ewing's first year resurfaced during the 1978-79 academic year. While continuing to take a reduced course load, he received incomplete grades in two of his three classes during the fall of 1978. Tr. II at 15-16, DX 14. Ewing claimed that ill health was partially responsible for his poor performance that semester. Tr. II at 16. He subsequently completed the coursework to remedy one of the incomplete grades, and took a make-up examination to remedy the other. Tr. II at 17-18. In the winter of 1979, while still taking a reduced courseload, Ewing failed Microscopic Anatomy and General Pathology, a fundamental medical science course. Tr. II at 19, Tr. III at 40-45, 261. His appeal to the professor of the "E" grade he received in this course was unsuccessful, and so his failing performance came to the attention of the Inteflex faculty board. Tr. II at 20-21, 24, Tr. III at 70, 266-267, DX 14, 44.

On July 25, 1979, the faculty board, in an attempt to help Ewing progress, placed him on an irregular,

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[4] Dean Robert E. Reed, M.D., Director of the Inteflex program, testified as follows:

> Q: [By Mr. Davis] What is the importance of taking more than one hard science course at a time?
>
> A: It requires, in order to take them at one time, it requires extra • • • focusing efforts and usually considered by [the faculty] Boards as evidence of ability to do just that. Boards regularly express concern if students have not performed at that level. [J.A. 47]

reduced-load program for the second time. J.A. 138. It also directed him to repeat the Microscopic Anatomy and General Pathology course he had just failed, and to complete the remainder of his Phase II curriculum in a prescribed manner and without further deficiency to demonstrate that his previous problems were corrected. J.A. 143-144; Tr. II at 19-20, 63. Ewing appealed the board's imposition of the prescribed program and requested the substitution of a program of his own design, but the board denied the appeal. J.A. 145; DX 18. The letter to Ewing confirming this denial reaffirmed the warning given earlier that any further deficiences would lead to his dismissal. J.A. 144-145; Tr. II at 36.

Ewing took a second leave of absence during the fall of 1979. J.A. 138. When he returned in the winter of 1980, he took a reduced courseload of 10 credit hours, which included repeating the Microscopic Anatomy and General Pathology course he had failed the previous year. J.A. 139; Tr. II at 25; DX 14. During the spring of 1980 he took two courses, receiving an incomplete grade in Neuroscience. As a result, Ewing received a third letter from the faculty board repeating its warning that any further deficiencies would lead to his dismissal. J.A. 146. He subsequently sat for a readministration of the final examination in Neuroscience and passed with a grade of "C." J.A. 127; Tr. II at 26; DX 14.

Ewing satisfactorily completed his fall 1980 coursework. However, he again encountered very serious difficulty during the winter of 1981. J.A. 128. He barely passed his Human Illness course, with the lowest overall score in the class. J.A. 129. In struggling with Pharmacology Ewing failed the mid-term examination

with the lowest score (a 39 out of a possible 100) ever seen by Professor La Du (Tr. III at 196), who agreed that he "bent over backwards to keep [Ewing] in the Program" (*Id.*) by throwing out his mid-term score when arriving at a final course grade. *Id.* at 195-196. Moreover, Ewing failed the final examination in Pharmacology when he first took it but was allowed a retest and was not given a fourth deficiency, which could have led to his dismissal from Medical School. J.A. 128, 139; Tr. III at 166-168.

C. The NBME Part I Examination

Petitioner's Medical School requires all of its students to sit for and pass a comprehensive examination of their biomedical knowledge before they are allowed to begin their clinical training. J.A. 38. This examination, promulgated by the National Board of Medical Examiners, is known as the NBME Part I. The NBME Part I scores are analyzed on a national mean of 500; however, satisfactory performance on the NBME when taken for medical school and not state licensure purposes is defined solely by each medical school's faculty. Tr. I at 190-191, DX 36 at 21. At the time Ewing sat for the examination, the faculty required a score of 345 for promotion to clinical training, although the National Board required a score of 380 for certification for state licensure. Tr. I at 191-192. Failure of the examination is treated as a formal academic deficiency by all faculty boards. J.A. 72; Tr. II at 67.

The NBME Part I is a two-day multiple choice examination designed to test each student's knowledge of and ability to integrate the basic biomedical sciences. Tr. I at 147-148. It tests students in seven subject

areas: anatomy, behavioral sciences, biochemistry, microbiology, pathology, pharmacology, and physiology. PX 4. A student may sit for the examination if he or she is enrolled as a student in an accredited medical school and is considered qualified under the school's particular standards. *Id.* Petitioner's Medical School considers a student qualified to sit for the examination if the student has no outstanding academic deficiencies in course work. In accordance with guidelines set forth by the National Board, the Medical School may allow a student who initially failed the examination another opportunity to pass it so long as the student remains enrolled and is qualified according to Medical School criteria. J.A. 39-40; Tr. I at 159, PX 4.

Ewing sat for the NBME Part I examination in June of 1981, while on warning. J.A. 41, 57. Having no outstanding academic deficiencies at the time, he was qualified to take the examination. J.A. 57, 62. He was, however, still subject to the faculty board's requirement that he complete Phase II of the Inteflex program, which included the NBME Part I examination, without further deficiency in order to remain in registration and be promoted to Phase III. J.A. 145-146; Tr. II at 64.

Ewing failed five of the seven subjects and had a total score of only 235 on the examination, well below the passing score of 345. J.A. 128, 139; DX 14. His failure of the NBME Part I constituted a formal deficiency and thus a failure to complete Phase II as prescribed by the Inteflex Promotion and Review Board. J.A. 72; Tr. II at 64-65. He had been warned that any academic deficiency would lead to his dismissal. J.A. 145-146.

D. Retests on the NBME Part I Examination

The Medical School had not promulgated any rule allowing a retest or a second chance at passing the NBME Part I Examination (J.A. 100), nor did the school have any policy allowing at least one retest where a student failed his first sitting of the examination. J.A. 8. However, it was a "common practice" (J.A. 40) or "standard practice" (J.A. 163) to allow a qualified student the opportunity to retake any examination, whether a course examination or the NBME Part I examination, after one failure. J.A. 8, 30, 39-40, 163. Yet this practice was not self-executing, and was in fact negated where a student was on warning. J.A. 163. Each student's case was placed on the meeting agenda and was separately considered by the appropriate Promotion and Review Board. J.A. 30. The exhibits received into evidence at trial show that many other Inteflex students (unidentified by name) were, like Ewing, also individually considered and evaluated. J.A. 129-132.

As it happened, the respective Promotion and Review Boards, upon individual consideration of each student's academic record, voted to allow 32 standard students (J.A. 107-110) and 8 Inteflex students (J.A. 111) at least one retest of the NBME Part I examination. However, undetermined numbers of standard students and at least 19 other Inteflex students were dismissed from Medical School for academic deficiences without being allowed to take the NBME Part I examination even once. J.A. 53, 165-166.

In the case of every student whose record was studied by a faculty board, the decision of the board was made solely on the basis of each student's record and without regard to what the board had done in

the case of any other student. J.A. 73. In considering Ewing's failure, members of the Inteflex Promotion and Review Board were not aware that every other Inteflex student failing the first administration of the NBME Part I test coincidentally had been granted a second test by the board. *Id.*[5]

E. The Inteflex Faculty Board's Decision To Dismiss Ewing From Registration

The first regular meeting of the Inteflex faculty board subsequent to Ewing's failure of the NBME Part I was on July 24, 1981. J.A. 121. As usual, the agenda included a consideration of the performance of students who had received academic deficiencies

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[5] Pathology Professor Bruce A. Friedman, M.D., testified on this point as follows:

Q: [By Mr. Conway] Are you aware that in the history of the Inteflex Program, no student has ever been dismissed for failing the NBME?

A: No.

Q: That wasn't told to you at the Promotion Board?

A: It's really irrelevant, and I wouldn't have wanted it told to me.

Q: Were you told every other Inteflex Student, in the history of the Program who had failed the first time, was given a second chance?

A: I wouldn't have wanted to be told. It wasn't brought up, and I would have objected had it been brought up.

Q. So, those factors weighed in no way in your consideration as to whether Mr. Ewing should be given a second chance?

A: Not only did not weigh, I would shut my ears to them. It's really irrelevant to the issue.

Q: And—were you also similarly unaware of the fact that each of the 32 Standard students who had failed the NBME Part I on the first occasion, was given a second chance, at least?

A: I had no opportunity to discuss those students, and I consider that irrelevant to my deliberation.

[Tr. III at 280-481.]

since the board's previous meeting. Ewing was one of several students discussed at this meeting. J.A. 121-133.

Ewing's failing score on the NBME Part I examination caused the board members grave concern, and so his individual circumstances were discussed at great length. J.A. 126-128. After reviewing Ewing's entire record, recalling the board's previous warning that he complete Phase II without further deficiency, and finding no extenuating circumstances, the board unanimously agreed that Ewing was no longer qualified to continue and should be dropped from the program. *Id.*

Ewing immediately petitioned the Inteflex board in writing to reconsider its decision and, on July 30, 1981, the board reconvened in special session to do so. J.A. 134. Seventeen faculty members attended (J.A. 135), and Ewing appeared in person to present evidence in support of his request. J.A. 139. Ewing explained that his poor performance was due to a number of factors, including a recent romantic disappointment and inadequate preparation time due to his need to make up his Pharmacology deficiency. J.A. 139-141. He also reminded the board of his intellectual abilities, as reflected by the honors he had been given in a clinical course and an extracurricular literary prize he had received. *Id.* In his written petition, however, Ewing admitted that he oftentimes overextended himself with his extracurricular activities. Tr. III at 109, DX 21. In response to questions from board members, Ewing agreed that he had exhibited a pattern of inadequate performance. J.A. 141. He explained that it may have been due to a lack of maturity, but that such tendencies were now behind him. *Id.* He also stated that he had been fully aware of the meaning of the board's previous warnings, and was "under the

gun" when he took the NBME because he knew that if he failed he could be dropped from registration.[6] J.A. 141-142. The board, however, after extensive reconsideration of all the circumstances, unanimously voted to reaffirm its earlier decision. J.A. 142.

On August 27, 1981, Ewing appealed the Inteflex faculty board's decision to the Medical School's eight-member Executive Committee. J.A. 147. Once again he appeared and presented evidence in support of his position. The Executive Committee voted unanimously to reaffirm the board's decision. *Id.*

On November 24, 1981, Dean Reed offered to permit Ewing to take a "shelf examination." Pet. App. at 20a, Tr. I at 192-195. A shelf examination is an administration of the NBME Part I the results of which at that time could be used for unofficial purposes, such as to support an application to another medical school. Tr. I at 193-194. The shelf examination offered Ewing was not to be used for readmission to any of the University of Michigan's Medical School programs. Tr. I at 194. Ewing chose not to take this shelf examination, and such examinations are no longer given by the Medical School.

Ewing appeared before the Executive Committee on two later occasions, June 17, 1982, and July 29,

[6] Respondent erroneously continues to dispute this statement. *See* Respondent's Brief in Opposition to the Petition for a Writ of Certiorari, p. 1, n. 1. Dr. Friedman's trial testimony does not constitute a disavowal as claimed by respondent, since Dr. Friedman merely said that he didn't recall Ewing saying that a single failure *would* result in his dismissal. J.A. 81. The testimony of both Dr. Friedman and Ewing himself as to what Ewing believed *would* happen in no way establishes what Ewing knew *could* happen.. J.A. 61, 81.

1982. J.A. 153-164. Each time he asked to be readmitted to the Medical School, and presented documentary and testimonial evidence to the committee members. The Executive Committee on each occasion, after deliberation, unanimously voted to affirm his dismissal. *Id.*

F. The Proceedings Below

On August 19, 1982, Ewing filed a four-count complaint in the United States District Court for the Eastern District of Michigan. The complaint sought equitable relief and damages in excess of one million dollars. His claim for damages was dismissed prior to trial as being barred by the Eleventh Amendment and was not appealed. Pet. App. at 4a. His equitable claim, as refined at trial, sought an order, first, placing him back in Medical School as an enrolled student and, second, permitting him a retest on the NBME Part I examination. J.A. 104. This claim was premised on three separate grounds: (1) violation under color of state law of Ewing's claimed right to substantive due process under 42 U.S.C. § 1983; (2) breach of contract; and (3) promissory estoppel. J.A. 13-16. A non-jury trial was held before Chief Judge John Feikens over four days in January 1983 and testimony was received from Ewing and eight of his professors.[7] The

[7] Other of his professors had been interviewed or subpoenaed by Ewing's attorney who decided not to call them as witnesses. In addition, the Medical School staff spent several weeks examining the records of hundreds of other students and extracting data requested by Ewing's attorney. J.A. 118. This data had never before been collected or compared by the Medical School. J.A. 36. See also Deposition of Senior Associate Dean Robert E. Reed, M.D. at pp. 15-18, 24 and 27; and Deposition of Professor of Neurosurgery and Associate Dean James A. Taren, M.D. at pp. 15-19, 26, and 78-79.

court denied each of Ewing's claims in its opinion filed on March 22, 1983. Pet. App. at 12a.

On appeal, the Sixth Circuit reversed the district court solely on the basis of Ewing's § 1983 claim. Pet. App. at 28a. It held that the Medical School, in denying Ewing a retest on the NBME, while "routinely" allowing retests to other students, had necessarily treated Ewing in an arbitrary and capricious manner in violation of his right to substantive due process. *Id.* at 32a. It ordered that he be permitted a retest and readmitted if he passed. *Id.* A timely petition for rehearing *en banc* was denied by the original hearing panel (Pet. App. 35a), even though the petition was accompanied by a previously missing portion of trial transcript (Supp. Tr.) which included the district court's finding that retests on the NBME were *not* "routine." J.A. 104.

SUMMARY OF ARGUMENT

Respondent Ewing is a California citizen who was dismissed from petitioner University of Michigan's Medical School for multiple academic deficiencies. Invoking 42 U.S.C. § 1983, he claimed that the school's refusal to grant him a retest on his last failed examination denied him substantive due process. The Sixth Circuit agreed. Petitioner argues that Ewing's claim is barred by the Eleventh Amendment and is unprotected by the Fourteenth Amendment.

The Eleventh Amendment bars a citizen of one state from bringing suit in the federal courts against another state for damages or equitable relief, particularly where the suit seeks to enforce disputed state

rules, customs or practices. *Pennhurst State School and Hospital* v. *Halderman,* —— U.S. ——, 104 S.Ct. 900 (1984).

A medical student's interest in repeating an examination given by a state university medical school is not entitled to substantive protection under the Due Process Clause of the Fourteenth Amendment. Substantive review of a faculty's decision to dismiss a student for academic reasons would intrude on the university's right to determine academic policy and evaluate student scholarship. Accordingly, federal courts should not entertain 42 U.S.C. § 1983 actions to set aside academic decisions of state medical schools on substantive grounds. Where those decisions are conceded to be procedurally correct, as in this case, the decisions must be presumed to be substantively correct as well.

The Sixth Circuit conducted an impermissible *de novo* review of the University of Michigan Medical School's dismissal of Ewing. It ignored the district court's finding that he was dismissed on the basis of his entire academic record, and not solely because he failed the examination. In ordering the Medical School to allow Ewing a re-examination, and in further ordering that he be reinstated in the school if he passes the examination, the Sixth Circuit fashioned relief beyond that which could have been ordered by Michigan state courts had they considered this case.

Medical school education is largely dependent upon the unstinting dedication of skilled medical educators. Judicial review and reversal of academic decisions has a chilling effect on all institutions of higher education and is not wise policy.

ARGUMENT

I. THE SIXTH CIRCUIT'S INJUNCTIVE ORDER IS AGAINST THE STATE OF MICHIGAN ITSELF, IS BARRED BY THE ELEVENTH AMENDMENT, AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *PENNHURST STATE SCHOOL AND HOSPITAL* v. *HALDERMAN*

A. Respondent Ewing's Claim Is Against The State Of Michigan And Petitioner Timely Interposed The Bar Of The Eleventh Amendment As An Affirmative Defense And Did Not Waive Its Eleventh Amendment Immunity.

The University of Michigan, known as the Regents of the University of Michigan under the Michigan Constitution[8] is recognized by the highest court of that state as a fourth branch of state government.[9] In both his original and amended complaint, respondent named petitioner "Board of Regents of the University of Michigan" as the only defendant, sought relief against the Board as an entity, and did not name or seek relief against the individual Regents as defendants. J.A. 13. Petitioner raised the bar of the Eleventh Amendment as an affirmative defense (J.A. 23) and, on motion, the district court dismissed respondent's damage claim, holding on the basis of settled law that petitioner was "a state instrumentality within the meaning of the Eleventh Amendment." Pet. App. at 8a.

[8] "The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan * * *." Michigan Constitution, Art. 8, § 5.

[9] *Regents of the University of Michigan* v. *State*, 395 Mich. 52, 74, 235 N.W.2d 1, 11 (1975); *Regents of the University of Michigan* v. *Michigan Employment Relations Commission*, 389 Mich. 96, 108, 204 N.W.2d 218, 223 (1973); *Board of Regents of the University of Michigan* v. *Auditor General*, 167 Mich. 444, 450, 132 N.W. 1037, 1040 (1911); and *Sterling* v. *Regents of the University of Michigan*, 110 Mich. 369, 377-378, 68 N.W. 253, 255-256 (1896).

Respondent contends that petitioner has waived any right to assert the Eleventh Amendment as a defense to respondent's claim for equitable relief. *See* Respondent's Brief In Opposition to the Petition for Certiorari, at pp. 11-13. Respondent bottoms his argument on various statements made in petitioner's district court briefs as to the type of relief which that court might have been able to fashion should respondent have prevailed (J.A. 5-6, 11-12), and on petitioner's failure to argue the Eleventh Amendment before the Sixth Circuit. J.A. 25-26.

Respondent's waiver argument ignores the history of these proceedings. The district court, in dismissing respondent's damage claim, specifically ruled that there had been no waiver of the Eleventh Amendment. Pet. App. at 4a-11a. Ewing did not appeal that decision and thereby conceded the correctness of the district court's ruling that the University of Michigan was entitled to Eleventh Amendment immunity. If the Eleventh Amendment affords immunity to the University of Michigan it does so no matter how far that immunity extends. This Court's later decision in *Pennhurst State School and Hospital* v. *Halderman*, —— U.S. ——, 104 S.Ct. 900, 909 (1984), made it clear that the scope of the Eleventh Amendment extends to claims for equitable relief. Moreover, the Eleventh Amendment defense had been raised as to respondent's entire complaint, including Ewing's claims for equitable relief. J.A. 23.

It was not necessary for petitioners to move to dismiss respondent's equitable claims in the district

court in order to preserve the Eleventh Amendment defense. *Edelman* v. *Jordan,* 415 U.S. 662, 676-678 *reh. den.* 416 U.S. 1000 (1974); *Pennhurst State School and Hospital* v. *Halderman,* —— U.S. ——, 104 S.Ct. 900, 907, n. 8 (1984); and *Ford Motor Co.* v. *Department of Treasury of Indiana,* 323 U.S. 459 (1945). The Sixth Circuit so held as to the University of Michigan. *MacDonald* v. *Board of Regents of the University of Michigan,* 371 F.2d 818 (6th Cir. 1967).

B. The Eleventh Amendment Bars Both Legal and Equitable Relief In This Case.

The Eleventh Amendment prohibits the federal judiciary from exercising any equitable powers in this suit brought by a California citizen against the State of Michigan. "[W]hen the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst State School and Hospital* v. *Halderman,* —— U.S. ——, 104 S.Ct. 900, 909 (1984).

The members of the governing Board of Regents of the University of Michigan, whether acting individually or officially as a group, would not think of determining for the faculty of the Medical School what subjects to teach or what individual student to admit, pass, or fail. Moreover, the Regents cannot be ordered by the federal courts in this case to grant *any* relief to the California respondent at bar because "the State is the real substantial party in interest * * *." *Ford Motor Co.* v. *Department of Treasury of Indiana,* 323 U.S. 459, 464 (1945). *See also Cory* v. *White,* 457 U.S. 85 (1982). The narrow exception of *Ex Parte Young,* 209 U.S. 123 (1908), does not apply because respondent's action was brought against "a body corporate" and not against individual state officials. *Edelman* v. *Jordan,* 415 U.S. 651, *reh. den.* 416 U.S. 1000 (1974). Accord *Quern* v. *Jordan,* 440 U.S. 332 (1979); *Alabama* v. *Pugh,* 438 U.S. 781 (1978); and *Hall* v. *Medical College of Ohio at Toledo,* 741 F.2d 299 (6th Cir. 1984).

C. The Lower Court's Injunction Illustrates The Timeless Purpose Of The Eleventh Amendment.

In *Pennhurst,* this Court observed that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." 104 S.Ct. at 911. In harkening to respondent's talismanic recitation of a "second chance" rule, and in not questioning respondent's seductively misleading statistics, the Sixth Circuit has brought into sharp focus the reason for this Court's emphasis in *Pennhurst.* By implicitly reserving matters of education to the several states, our Constitution has permitted medical school education in this country to flourish with the development of large medical centers of premier excellence. Even the Supreme Court of Michigan, in opinions which have withstood the test of time, has refused to interfere with the faculty of the Medical School in establishing its curriculum, in selecting its faculty and students, and in passing upon the qualifications of its students.[10]

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[10] *People Ex Rel. Drake* v. *Regents of the University of Michigan,* 4 Mich. 98 (1856) (mandamus to appoint homeopathic professor denied); *People* v. *Regents of the University,* 18 Mich. 469 (1869) (state statute requiring appointment of professor of homeopathy unconstitutional); and *Attorney General* v. *Regents of the Univer-*

More than law school,[11] medical school education is designed to rigorously train students to perform decisively and correctly and to make rapid life-saving decisions, even in a crisis atmosphere. For this reason, the courses and tests during the curriculum are so arranged and structured as to train medical students for later patient care. Thus, the comprehensive NBME Part I examination is administered by the Medical School immediately after the basic phase but before the clinical science phase of a student's education in order to timely test the student's fund of knowledge essential to treat human illnesses. In 1981 a score of 345 was required for promotion to the clinical phase. Respondent earned a score of 235, which the district court found to be the lowest score ever recorded in the history of the Medical School. Pet. App. at 15a.

Only the most sanguine educator would expect respondent to pass the examination a second time if he were required to take it under normal conditions, in the midst of a stressful curriculum, competing against fellow students. J.A. 72. Yet the Sixth Circuit's order allows respondent to take the examination after studying for it at his leisure, on his own terms, and on his own time,[12] thus defeating an essential purpose of test-

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sity, 30 Mich. 472 (1874) (application to require appointment of two professors of homeopathy declined).

[11] On this point see especially *People* v. *Phippen*, 70 Mich. 6, 19-20, 37 N.W. 888, 895 (1888).

[12] The district court's final judgment of December 4, 1984, was entered pursuant to the Sixth Circuit's order and was drafted by counsel for respondent. Pet. App. at 1a-3a. It shows that respondent has selected September of 1986 as the date for his second sitting of the NBME Part I examination, thus giving him some five years after his failure of the examination to prepare for a retest, whereas his former classmates had just a few days to prepare for such examination. Furthermore, the final judgment states that respondent is to be graded under 1981 standards (passing score of 345), even though the Medical School's present passing score is 380 for all students.

ing in the Medical School curriculum.[13]

D. Respondent's Complaint Could Have Been Handled Competently By The Michigan State Courts.

The Sixth Circuit's order constitutes grading by demoralizing injunction and demonstrates in two other ways why federal courts should not venture into state academic thickets. First, it exceeds even what Michigan's state courts could have ordered had respondent brought this action in those courts. *Maitland* v. *Wayne State University*, 76 Mich. App. 631, 639-640, 257 N.W.2d 195, 200 (1977) (state courts cannot order reinstatement, only rehearing at university level). *See Dietz* v. *American Dental Association*, 479 F.Supp. 554 (E.D. Mich. 1979). Second, it orders petitioner to perform an academically impossible task since only students who are officially enrolled in United States or Canadian medical schools may sit for the NBME Part I examination.[14]

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[13] The opening essay of a leading textbook on medicine teaches that "the practice of medicine cannot be sealed off into convenient hours * * *." R. Cecil, *Textbook of Medicine* at xxxvi (J. Wyngaarden & L. Smith, 16th ed. 1982).

[14] The National Board of Medical Examiners is an independent entity located in Philadelphia and is not a party to this action. As appears from the annual NBME Official Bulletins, a student not officially enrolled in or graduated from a United States or Canadian accredited medical school is not eligible for administration of any NBME examination. See, for example, PX 4.

There is no reason why § 1983 claims like respondent's should not be brought in state courts. *Bonner* v. *Circuit Court of the City of St. Louis,* 526 F.2d 1331 (8th Cir. 1975), *cert. den.* 424 U.S. 946, *reh. den.* 425 U.S. 926 (1976).

State courts time and again have demonstrated their competence to handle cases very similar to the case at bar. *Tanner* v. *Board of Trustees of the University of Illinois,* 121 Ill. App. 3d 139, 459 N.E.2d 324 (1984); *Neel* v. *Indiana University,* 435 N.E.2d 607 (Ind. App. 1982); *In re Levy,* 88 A.D. 915, 450 N.Y.S.2d 574 (1982); *McIntosch* v. *Borough of Manhattan Community College,* 55 N.Y.2d 913, 433 N.E.2d 1274 (1982); *Essigman* v. *Western New England College,* 419 N.E. 2d 1047 (Mass. App. 1981); *Sofair* v. *State University of New York,* 44 N.Y.2d 475, 377 N.E.2d 730 (1978); *Maitland* v. *Wayne State University,* 76 Mich. App. 631, 257 N.W.2d 195 (1977); *Frank* v. *Marquette University,* 209 Wis. 372, 245 N.W. 125 (1932); and *Barnard* v. *Inhabitants of Shelburne,* 216 Mass. 19, 102 N.E. 1095 (1913).

II. FEDERAL COURTS SHOULD NOT SUBSTANTIVELY REVIEW AND REVERSE THE ACADEMIC DECISIONS OF PROFESSIONAL EDUCATORS UNDER 42 U.S.C. § 1983

A. The Sixth Circuit's Order Is An Unwarranted Intrusion Into Academic Decisionmaking.

The lower court's order is a dangerous precedent that seriously threatens all medical school education in this country. Indeed, it has sounded a shock wave throughout the community of medical schools in the United States and has dispirited Ewing's former professors, at least one of whom devoted more than a hundred hours in reviewing his academic record and hearing his appeals. J.A. 78. If allowed to stand, and if followed by other courts in other jurisdictions, it could lead medical school faculties to abandon carefully developed and longstanding evaluation processes in favor of inflexibly applied standards which could signal the end of high-quality medical school education in this country.

Such drastic transformation of the educational process would not enhance its fairness, but would deprive countless students of the extra assistance and encouragement presently afforded them through the flexibility inherent in an individualized evaluation system. As this Court cautioned in *Board of Curators of the University of Missouri* v. *Horowitz,* 435 U.S. 78 (1978), "any such intrusion into academic decisionmaking" therefore must be carefully avoided. *Id.* at 92.

B. Judicial Deference To Academic Decisions Has Long Been Recognized.

Repeatedly this Court has emphasized the special nature of academic decisionmaking and the federal judiciary's traditional reluctance to interfere in that process.[15] Such reluctance is particularly appropriate at the college, graduate and professional school level, where the relationship between students and faculty is

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[15] *Board of Education of the Hendrick Hudson Central School District* v. *Rowley,* 458 U.S. 176, 208 (1982); *University of California Regents* v. *Bakke,* 438 U.S. 265, 312 (1978); *Board of Curators of the University of Missouri* v. *Horowitz,* 435 U.S. 78, 90-92 (1978); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 42 (1973); *Tinker* v. *Des Moines School District,* 393 U.S. 503, 507 (1969); *Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968); and *Sweezy* v. *New Hampshire,* 354 U.S. 234, 261-263 (1957) (Frankfurter, J., concurring).

a purely voluntary undertaking. In this setting, "[i]t is the business of the university to provide that atmosphere which is most conducive to speculation, experiment and creation." *Sweezy* v. *New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

The trial court analyzed at some length why federal courts ought not examine the substance of academic decisions. As Chief Judge Feikens aptly concluded, "it is for prudential as well as pragmatic reasons that the propriety of [such] decisions cannot be reviewed." Pet. App. at 26a. In reversing, however, the Sixth Circuit failed to acknowledge even a single restriction on its authority to address the petitioner's decision to dismiss Ewing for failure to meet the Medical School's academic standards.

1. Academic freedom rests on the ability of professional educators to exercise good faith discretion.

Judicial reluctance to intrude upon the academy stems primarily from our national dedication to safeguarding academic freedom. *See Healy* v. *James,* 408 U.S. 169, 180-181 (1972); *Keyishian* v. *Board of Regents of New York,* 385 U.S. 589, 603 (1967); and *Sweezy* v. *New Hampshire,* 354 U.S. 234 (1957). In *Sweezy,* Chief Justice Warren stressed the importance of academic freedom on college campuses:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. [*Id.* at 250.]

Central to encouraging academic freedom is the principle that educators, being in the best position to do so, must be left free to make their own decisions. *See Doe* v. *New York University,* 666 F.2d 776 (2d Cir. 1981). *Mahavongsanan* v. *Hall,* 529 F.2d 448 (5th Cir. 1976); and *Jansen* v. *Emory University,* 440 F. Supp. 1060 (N.D. Ga. 1977). Courts, laboring under heavy dockets, are ill-equipped to make sensitive academic decisions which require the "expert evaluation of cumulative information." *Board of Curators* v. *Horowitz,* 435 U.S. at 90.

In addressing the substantive due process rights under 42 U.S.C. § 1983 of persons involuntarily committed to a state mental institution, this Court recently explained the approach the federal judiciary should take toward decisions made by professionals. *Youngberg* v. *Romeo,* 457 U.S. 307 (1982). Ruling that the decisions of professionals are presumptively valid, the Court wrote:

> In determining what is "reasonable" * * * we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges [to professional judgment] * * * interference by the federal judiciary with the internal operations of these institutions should be minimized. Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions. * * * For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. [*Id.* at 322-323.]

Petitioner's medical faculty based its professional decision to dismiss Ewing upon his record as a whole, and upon "grave doubts" of Ewing's "ability to assume responsibility as a physician" (J.A. 164), and not just upon his failure of the NBME. J.A. 57. Even when the medical faculty had allowed a retest to other students who failed the first administration of the NBME, it always reviewed, deliberated and voted on each student's entire record (J.A. 129-132), and this process was not a mere "routine." J.A. 104.

Under these circumstances, the medical faculty's decision to dismiss Ewing is entitled to a presumption of validity, since it was based on a collective, professional judgment that he was unqualified to continue in his studies. The mere fact that the faculty reached different conclusions as to other students can not mean that the faculty's decision in Ewing's case was based on anything other than professional judgment, practice or standards.

It is particularly appropriate to presume the validity of the medical faculty's judgment here, since it intimately concerns whether Ewing himself should be allowed the opportunity to become a medical professional. Virtually every one of Ewing's professors who was subpoenaed as a witness testified that Ewing was not competent to continue in the Medical School and should not be allowed to go on to become licensed as an M.D.[16]

[16] The only professor to testify that Ewing should have been given a second chance was Pharmacology Professor Bert N. La Du, M.D., Ph.D., who conceded that he knew more about the standard program than the Inteflex program and therefore admitted that he could not speak as a member of the Inteflex Promotion and Review Board (Tr. III at 198, 201), testified that the Promotion Board would have had more information concerning Ewing than individual faculty members, including La Du (*Id.* at 194), that he had

Professor of Biological Chemistry K. M. Jairam Menon, Ph.D., testified that Ewing thought "the world owed him a living" and that he should not be allowed to continue in the program "[b]ecause he doesn't seem to know that much of the basic sciences on the basis of" his NBME Part I scores. J.A. 70. Professor of Human Genetics Henry Gershowitz, Ph.D., who spent six to eight hours as a member of the Promotion and Review Board in consideration of Ewing's case (J.A. 72), testified that Ewing was "certainly doomed to failure" and thin in view of his "very abysmally poor record * * * there was just no point in continuing this." J.A. 72-73.

Finally, Professor of Pathology Bruce A. Friedman, M.D., who testified that he served on many due process committees within the university, and who is well known as an advocate of student rights, testified that he was "absolutely certain [Ewing] should be dropped from registration, [and] not be allowed to continue." J.A. 78. When asked to explain why he was so certain, Professor Friedman testified that Ewing's failure of the NBME Part I examination was "one of many deficiencies * * * [and] the straw that broke the camel's back. It's absolutely an abysmal performance; in my opinion, unremedial." J.A. 79. Dr. Friedman concluded by asserting that Ewing's manner of approaching problems "would be a damaging kind of way to treat patients." *Id.*

Most people who enter medicine or academic life are attracted to the profession by their desire to help people. The entire Medical School faculty, no less than

"no reason to question that a fair hearing was had" (*Id.* at 195), and that the members of the committee were concerned and conscientious and indeed anguished over their decisions of dismissal. *Id.* at 197.

those of its members who were quoted above and who gave selflessly of their time and talents only to be searchingly cross-examined both on deposition and at trial, do not fathom the basis for what they perceive to be a cavalier reversal of their unanimous decision, and may not be as willing to shoulder the burden of committee appointments within the Medical School in the future.

Faculty members quite often feel a sense of failure when they are unable to help a student who performs deficiently. As a result, they may find themselves helping a student beyond any extent which is reasonable in an effort to lessen the internal conflicts of personal values and expectations which they hold for the student.[17] Where the deficient student is gratuitously furnished an abundance of help, beyond what any student or faculty member should expect, judicial reversal of the final, carefully considered decision to dismiss him is not only wrong, it is destructive.

2. Federal intrusion into a domain historically the province of state authorities undermines historic principles of federalism.

Under the Tenth Amendment any review of rules promulgated by a state governmental unit must take into account the framers' concept of the proper relationship between the state and federal governments. Historically public education has been committed to the control of state and local authorities. *Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968). *See also Board of*

[17] Irby, Fantel, Milam and Schwartz, *Faculty Rights and Responsibilities in Evaluating and Dismissing Medical Students,* J. Coll. & Univ. Law 102, 116-117 (Spring 1981).

Education of the Hendrick Hudson Central School District v. *Rowley,* 458 U.S. 176, 207-208, n. 30 (1982).

In the permissible exercise of their broad discretionary powers, state and local authorities have developed a complex framework of written and unwritten rules and policies to govern the diverse elements which comprise their educational systems. Maintenance of principles of federalism is especially compelling in the academic arena because of the broad impact of federal intrusion. As this Court stated in refusing to condemn a concededly imperfect financing system adopted by a Texas school district, "it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every state." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 44 (1973). Similarly, federal supervision of the academic review and evaluation system employed by petitioner's Medical School, as well as by nearly every other post-secondary educational authority across the country, would seriously undermine the proper balance of our federal system.

3. The costs of federal oversight of academic decisions outweigh any short term benefits.

Involvement of the federal courts in questions of academic qualification, in addition to complicating an already difficult decisionmaking process, would also impose substantial costs on academic institutions and on society in general. Lawsuits brought by aggrieved students would expand an already heavy federal caseload. Courts necessarily would become involved in "inspection and review" of examinations, and trials "would

require the opinion testimony of experts and submerge the court in the testing and grading process." *Lavash* v. *Kountze,* 604 F.2d 103, 106 (1st Cir. 1979) (challenge of Massachusetts procedures respecting civil service examinations). Such a result "would impose fiscal and administrative burdens out of all proportion to the ends sought." *Id.* Increasingly severe education funding problems then would be aggravated as limited funds would be diverted to finance growing litigation costs.

Extracautionary objective measures, adopted by institutions to avoid disruptive litigation, could diminish their faculties' ability to give individualized attention to marginal students, and would militate against the admission of high risk students from educationally disadvantaged backgrounds. Faculty members, such as those involved in the present case, might well choose to forego academic life altogether.

Finally, the value of degrees conferred on other students would be diluted, as federal courts would essentially have the power to award degrees to students who, in the institution's judgment, are academically unqualified. *See, e.g., Bleicker* v. *Board of Trustees of Ohio State University,* 485 F. Supp. 1381, 1389 (S.D. Ohio 1980) (additional tuition to be gained by readmitting student would be outweighed by the loss of the University's integrity and reputation of its degrees).

On the other side, any benefits which might result from judicial supervision of academic decisionmaking are slight. Time spent by faculty in considering and evaluating students on an individual basis would be greatly reduced by the application of objective standards, and faculty would therefore be able to devote more of their time to research and other academic

pursuits. Through application of wooden standards, every student would know exactly how many opportunities he or she and every other student would have in order to overcome any academic weaknesses, and extenuating circumstances would not be taken into account.

The result of balancing the costs and the benefits of any judicial intervention into academic decisionmaking is clear. The federal judiciary must defer to the decisionmaking expertise of professional educators.

C. Failure To Give A Student Remedial Opportunities Offered Other Students Does Not By Itself Amount To An Arbitrary And Capricious Denial Of Substantive Due Process.

1. Where a medical faculty's decision to dismiss an academically deficient student has been carefully and deliberately considered, its substance necessarily must be presumed correct.

In *Board of Curators* v. *Horowitz,* 435 U.S. 78 (1978), this Court considered those procedures which a state university medical school should follow before dismissing an academically deficient student. *Horowitz* requires a medical school to give a student notice of his or her deficiencies, but does not require the school to conduct a hearing at which the student may personally appear. *Id.* at 85-86. The Court found that the University of Missouri reached a "careful and deliberate" decision to dismiss Charlotte Horowitz. *Id.* at 85.

Significantly, Ewing (unlike Charlotte Horowitz) has never challenged the procedures followed by petitioner's Medical School in dismissing him for failure to meet its academic standards. J.A. 16, 85-86. Indeed, petitioner's medical faculty extended him more than ample opportunity to vindicate his academic failure.

Ewing was clearly notified on numerous occasions of the faculty's dissatisfaction with his progress and the danger that this posed to his continued enrollment. J.A. 143-146. He was also given several opportunities to present his position to the faculty, and he submitted a number of letters, DX 21, 22, 23, 24, 27, 31, 33 and 34, as well as copies of articles he had written, details of honors and awards he had received, and letters of reference written on his behalf by others. DX 11, 12, 13 and 44. In addition, although not required under *Horowitz,* the faculty gave Ewing four opportunities to present his position in person. He appeared once before the Inteflex Promotion and Review Board (J.A. 134), and three times before the Medical School's Executive Committee, J.A. 147-164.[18]

Ewing's claim for violation of his substantive due process rights therefore can be distinguished from virtually every other case in which the federal courts have considered the propriety of student academic dismissals. In most of these cases, *both* the substantive and procedural sufficiency of the dismissal decision were at issue.[19] It is enough to satisfy the due process

[18] One faculty member testified that he spent more time reviewing Ewing's record and considering his appeals than he spent on any other student. J.A. 78.

[19] *See Stoller* v. *College of Medicine,* 562 F.Supp. 403 (M.D. Pa. 1983), *aff'd* 727 F.2d 1101 (3d Cir. 1984); *Greenhill* v. *Bailey,* 519 F.2d 5 (8th Cir. 1975); *Gaspar* v. *Bruton,* 513 F.2d 843 (10th Cir. 1975); *Hubbard* v. *John Tyler Community College,* 455 F. Supp. 753 (E.D. Va. 1978); *Aubuchon* v. *Olsen,* 467 F.Supp. 568 (E.D. Mo. 1979); and *Watson* v. *University of South Alabama College of Medicine,* 463 F.Supp. 720 (S.D. Ala. 1979). *But see Hines* v. *Rinker,* 667 F.2d 699 (8th Cir. 1981) (no allegation of procedural due process violation); and *Stevens* v. *Hunt,* 646 F.2d 1168 (6th Cir. 1981) (procedural due process violation originally

clause of the Fourteenth Amendment that procedures, however informal and non-adversarial, result in academic decisions which are "careful and deliberate." *Board of Curators* v. *Horowitz,* 435 U.S. at 85. *See Henson* v. *Honor Committee of University of Virginia,* 719 F.2d 69 (4th Cir. 1983) (academic deficiencies and cheating); *Stebbins* v. *Weaver,* 537 F.2d 939, 943 (7th Cir.) *cert. den.* 429 U.S. 1041 (1976) (faculty tenure); *Slaughter* v. *Brigham Young University,* 514 F.2d 622, 625 (10th Cir.), *cert. den.* 423 U.S. 898 (1975) (academic dishonesty); and *Anderson* v. *Banks,* 520 F.Supp. 472, 506 (S.D. Ga. 1981) (educational policy).

The decision below aside, one of the few and perhaps the leading post-*Horowitz* case in which a naked claim for substantive relief was alleged is *Hines* v. *Rinker,* 667 F.2d 699 (8th Cir. 1981). The medical student in *Hines* claimed that the school's failure to allow him to transform a failing grade into an incomplete and subsequently make up the deficiency, as purportedly provided by a written course outline, constituted arbitrary and capricious conduct in violation of his substantive due process rights. The student prosecuted nine costly appeals of his dismissal within the University before bringing his lawsuit, yet at each level his dismissal was affirmed. In the process, the entire medical school faculty reviewed his performance, both in the course he failed and as reflected by his overall academic record, which included a previous dismissal for academic reasons.

claimed but abandoned on appeal); and *McElearney* v. *University of Illinois,* 612 F.2d 285, 291 (7th Cir. 1979) (no due process claim presented).

The Eighth Circuit, without deciding whether the student had a cause of action under *Horowitz,* held under essentially the same standard employed by the Sixth Circuit, both in *Stevens* v. *Hunt,* 646 F.2d 1168, 1170 (6th Cir. 1981), and in the case at bar (Pet. App. at 32a), that there was no evidence of arbitrary and capricious action as a matter of law. Although the Eighth Circuit in *Hines* did not expressly premise its holding on the presence of precedural protections afforded the student by the University of South Dakota School of Medicine, it is clear that the court was impressed by the faculty's careful consideration of the student's circumstances. As is demonstrated by *Hines,* where a decision to dismiss is carefully and deliberately reached, substantive review is not warranted because any decision so reached, by definition, cannot be arbitrary and capricious.

Trial courts demonstrate no difficulty in reviewing academic procedures. It is when they pass on to review the academic substance of medical school decisions that the reported cases reflect a serious misplacement of judicial resources. *Watson* v. *University of South Alabama College of Medicine,* 463 F.Supp. 720 (S.D. Ala. 1979); and *Stoller* v. *College of Medicine,* 562 F.Supp. 403 (M.D. Pa. 1983).

By contrast, the Seventh Circuit has adopted a district court opinion which holds that if the plaintiff fails to present a case for violation of procedural due process, "it follows that no substantive due process claim has been stated either." *McElearney* v. *University of Illinois,* 612 F.2d 285, 291 (7th Cir. 1979). See also *Sanders* v. *Ajir,* 555 F.Supp. 240 (W.D. Wis. 1983); *Hall* v. *University of Minnesota,* 530 F.Supp. 104 (D. Minn. 1982); and *Ross* v. *Pennsylvania State University,* 445 F.Supp. 147, 154 (M.D. Pa. 1978).

Similarly, the Fourth Circuit refused to inquire into the academic reasons for the dismissal of a law student on grounds that such substantive review was prohibited under *Horowitz,* and strictly limited its review to the fairness of the procedures by which the dismissal was reached, *Henson* v. *Honor Committee of University of Virginia,* 719 F.2d 69 (4th Cir. 1983), observing:

> We cannot judge the reasons [the student] offers on appeal for these failures—that task belongs properly to the law school administrators. The limit of judicial inquiry into academic administration is early reached, and we need not even approach the limit to realize that, as unfortunate as his ultimate position may be, [the student] was fairly treated academically. [*Id.* at 72.]

In yet another law school dismissal case, the trial judge abstained from a substantive examination of the plaintiff's course grades at Texas Southern University School of Law, observing that "[i]t is difficult to imagine an area of academic life more suitable for judicial abstention." *Keys* v. *Sawyer,* 353 F.Supp. 936, 939 (S.D. Tex. 1973).

It cannot be gainsaid that if judges are to refrain from reviewing the substance of academic decisions made by law schools, they should exercise even more restraint when called upon to review academic decisions made by medical schools.

2. The standard of review adopted by the Sixth Circuit, if not inappropriate entirely, was incorrectly applied

In *Board of Curators* v. *Horowitz* this Court did not directly settle the issue whether substantive review of decisions by professional educators to dismiss a

student for academic deficiency is permissible. 435 U.S. at 91-92. Nonetheless, a number of courts, including the Sixth Circuit, have relied on *Horowitz* as support for the view that such a claim consists of three separate elements. Although disagreeing in their understanding of *Horowitz,* these courts generally require that the student be deprived of a protected liberty or property interest under color of state law in an arbitrary or capricious manner.[20] Other courts have avoided detailing the elements of the alleged claim by finding that no showing of arbitrariness or capriciousness had been made.[21] This claimed substantive due process cause of action plainly has been troublesome to the lower courts.

In addressing the procedural due process claim in *Horowitz,* this Court only assumed for purposes of analysis the existence of a protectible liberty or property interest in pursing a medical career. 435 U.S. at 84-85. Some lower courts considering substantive due process claims have done likewise. *St. Louis Developmental Disabilities Treatment Center* v. *Mallory,* 591

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[20] *Stevens* v. *Hunt,* 646 F.2d 1168 (6th Cir. 1981); *Williams* v. *Howard University,* 528 F.2d 658 (D.C. Cir.), *cert. den.* 429 U.S. 850 (1976); *Gaspar* v. *Bruton,* 513 F.2d 843 (10th Cir. 1975); and *Stoller* v. *College of Medicine,* 562 F.Supp. 403 (M.D. Pa. 1983), *aff'd,* 727 F.2d 1101 (3rd Cir. 1984). *See also St. Louis Developmental Disabilities Treatment Center Parents Ass'n.* v. *Mallory,* 591 F.Supp. 1416 (W.D. Mo. 1984).

[21] *Hines* v. *Rinker,* 667 F.2d 699 (8th Cir. 1981); *Watson* v. *University of South Alabama College of Medicine,* 463 F. Supp. 720 (S.D. Ala. 1979); *Aubuchon* v. *Olsen,* 467 F.Supp. 568 (E.D. Mo. 1979). *Cf. Hubbard* v. *John Tyler Community College,* 455 F.Supp. 753 (E.D. Va. 1978) (court refused to consider plaintiff's substantive due process claim, but noted that no arbitrary and capricious conduct existed).

F.Supp 1416, 1475 (W.D. Mo. 1984) (Hunter, J.). Some courts, including the Sixth Circuit in the case at bar, have held that a student possesses a constitutionally protectible property interest in an education. Pet. App. at 31a. See also *Stevens* v. *Hunt,* 646 F.2d 1168, 1169-1170 (6th Cir. 1981); *Gaspar* v. *Bruton,* 513 F.2d 843, 850 (10th Cir. 1979); and *Stoller* v. *College of Medicine,* 562 F.Supp. 403, 412 (M.D. Pa. 1983). Yet Ewing alleged only the lesser interest in continued enrollment. J.A. 15-16.

Property interests are creatures entirely of state law. *Board of Curators* v. *Horowitz,* 435 U.S. at 82; *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972); *Perry* v. *Sindermann,* 408 U.S. 593, 599-603 (1972). They may arise from express or implied contractual provisions or other existing rules or understandings. *Id.* at 601-602.

Michigan law is clear that an individual does not possess a property right in the practice of a particular business or profession. *People* v. *Phippen,* 70 Mich. 6, 37 N.W. 888 (1888) (medicine and law); *Falk* v. *State Bar of Michigan,* 411 Mich. 63, 128, 305 N.W.2d 201, 223 (1981) (law); *Nelles* v. *Superintendent of Public Instruction,* 5 Mich. App. 47, 51, 145 N.W.2d 795, 797 (1966), *lv. app. den.* 378 Mich. 748, *cert. den.* 389 U.S. 9 (1967) (psychology). Nor does Michigan regard education itself as a fundamental right under Michigan's Constitution of 1963. *East Jackson Public Schools* v. *Michigan,* 133 Mich. App. 132, 137, 378 N.W.2d 303, 305 (1984), construing *Governor* v. *State Treasurer,* 390 Mich. 389, 212 N.W.2d 711 (1973). See also *Sutton* v. *Cadillac Area Public Schools,* 117 Mich. App. 38, 323 N.W.2d 582 (1982).

The Sixth Circuit, relying on *Perry* v. *Sindermann,* 408 U.S. 593 (1972), and on an old Michigan case, *Booker* v. *Grand Rapids Medical College,* 156 Mich. 95, 120 N.W. 589 (1909), held that Ewing possessed a contractual right, which rose to the level of a protectible property interest, in not being arbitrarily dismissed from the Medical School. Pet. App. at 30a-31a. According to the Sixth Circuit, this property interest also embraced the right to a second chance on the NBME Part I, although the court never expressly addressed this point. It did, however, reverse as "clearly erroneous" the trial court's factual finding that the university had not bound itself either expressly or by a course of conduct to give Ewing a second chance to take the NBME Part I, despite undisputed testimony that students were only allowed a retest by independent and separate action of the faculty boards. J.A. 30, 129-132; Pet. App. at 32a-33a.

The Sixth Circuit panel in the case at bar further ignored a significantly relevant decision rendered by another panel of the same court which found, under comparable Tennessee law, that a medical student had no property right in a retest on the NBME examination. *Stevens* v. *Hunt,* 646 F.2d 1168, 1170 (6th Cir. 1981). It also failed to recognize that the possibility of academic failure is implicit in the relationship between a student and a university, whether that relationship is characterized as contractual or otherwise, *Marquez* v. *University of Washington,* 648 P.2d 94, 97 (Wash. App. 1982). It also erred in seeking to bolster its contract finding by referring, not to the Medical School's official catalogs (DX 32-40), but to a promotional magazine (J.A. 113) which referred to qualified standard students and not unqualified stand-

ard or Inteflex students (J.A. 82), and which was known by Ewing to be inapplicable to him. J.A. 60.

In *Jansen* v. *Emory University,* 440 F.Supp. 1060 (N.D. Ga. 1977), where the court rejected a similar claim based on one sentence in a college bulletin, Judge Moye wrote:

> Over these bare bones the plaintiff attempts to drape the entire panoply of due process rights developed by the Supreme Court in cases such as *Board of Regents* v. *Roth,* 408 U.S. 564 (1971), and *Goss* v. *Lopez,* 410 U.S. 565 (1975). * * * The underlying assumption [of plaintiff as to the meaning of the language in the college bulletin] is extravagant. [*Id.* at 1062.]

The Sixth Circuit's analysis of Ewing's alleged property right is therefore flawed.

The lower courts have been especially troubled by the interpretation and application of the arbitrary and capricious component of a claimed substantive due process cause of action, and have been unable to reach a consensus. Some courts have found, without defining the requirement, that no such conduct could be established on the facts presented. *Bleicker* v. *Board of Trustees of Ohio State University,* 485 F. Supp. 1381, 1387 (S.D. Ohio 1980). Other courts, cited with approval in *Horowitz,* only considered whether the university officials had acted in bad faith. *Gaspar* v. *Bruton,* 513 F.2d 843, 850 (10th Cir. 1975), and *Barnard* v. *Inhabitants of Shelburne,* 216 Mass. 19, 102 N.E. 1095 (1913). *See also Depperman* v. *University of Kentucky,* 371 F.Supp. 73, 76 (E.D. Ky. 1974). Still other courts, including the Sixth Circuit, have held that if the decision was made in bad faith or is

without rational basis the requirement is satisfied. Pet. App. at 32a; *Stevens* v. *Hunt,* 646 F.2d 1168, 1170 (6th Cir. 1981); *Hines* v. *Rinker,* 667 F.2d 699, 703 (8th Cir. 1981); and *Stoller* v. *College of Medicine,* 562 F.Supp. 403, 412 (M.D. Pa. 1983). One court has stated that the showing can be made only where another student with an academic record and an individual history very similar to the plaintiff's was afforded substantially different treatment. *Watson* v. *University of South Alabama College of Medicine,* 463 F.Supp. 720, 727 (S.D. Ala. 1978). A number of slightly differing formulations of the requirement have also been adopted.[22] However, regardless of the precise standard adopted, it is generally agreed that the aggrieved student must present clear evidence that the requirement of arbitrary and capricious action has been satisfied. *Gaspar* v. *Bruton,* 513 F.2d 843, 850 (10th Cir. 1975).

Given the disagreement among the lower courts as to how "arbitrary and capricious" action may be demonstrated, it is certainly clear that the standard

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[22] *Williams* v. *Howard University,* 528 F.2d 658 (D.C. Cir.) *cert. den.* 429 U.S. 850 (1976) (improper motivation or irrational action); *Aubuchon* v. *Olsen,* 567 F.Supp. 568, 752 (E.D. Mo. 1979) (bad faith or arbitrary action); *Connelly* v. *University of Vermont,* 244 F.Supp. 156, 161 (D. Vt. 1965) (dismissal is for reasons other than the quality of the student's work or was in bad faith). *Compare Dunlop* v. *Bachowski,* 421 U.S. 560, 572-573 (1975) (federal courts may only review whether statement of reasons, without more, given by Secretary of Labor to justify refusal to institute action on behalf of private complainant under §401 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 481), is so irrational as to render the decision arbitrary and capricious).

adopted by the Sixth Circuit is not appropriate. Indeed, just after *Horowitz* was decided, this Court held that the due process protection of 42 U.S.C. § 1983 did not extend to a state's personnel decisions absent any motivation to curtail or penalize the exercise of an employee's constitutionally protected right. *Bishop* v. *Wood,* 426 U.S. 341, 350 (1976).

Assuming the appropriateness of *Bishop,* the Sixth Circuit's application of the arbitrary and capricious standard to the facts of this case is startling. Since the Sixth Circuit did not disturb the trial court's finding that the petitioner's decision to dismiss Ewing was not motivated by "bad faith, ill will, or other impermissible ulterior motives" (Pet. App. at 26a), it was inferentially applying the no rational basis test. Yet the court premised its holding on a single fact—Ewing's denial of a retest. It never expressly concluded that the existence of that sole fact demonstrated that there was no rational basis for the faculty's decision nor, indeed, could it have. The egregious nature of Ewing's academic record as a whole, never once addressed by the Sixth Circuit, convincingly establishes that the faculty "had good reason to dismiss Ewing from the program." Pet. App. at 26a.

3. Civil Rights legislation was never intended and should not be used to give the federal courts jurisdiction over traditional state law contract claims.

The Sixth Circuit found an implied contract in a disputed state rule purportedly allowing Ewing a retest. Pet. App. 32a-33a. To do so, it reversed the trial court's factual finding that no such rule existed. *Id.* In further stating that the petitioner's mere failure to comply with this disputed rule (in which it found

Ewing to have a protectible property interest) necessarily constituted arbitrary and capricious state action, the Sixth Circuit essentially has transformed a garden variety state contract action into a federally protectible right under 42 U.S.C. § 1983.

The Sixth Circuit's decision, astonishing in its naive view of higher education, assumes that the University's single failure to follow its own "rule" amounts to a constitutional violation. Yet, in *Horowitz* this Court implied the very opposite was true. 435 U.S. at 92, n. 8. See also *Bauza* v. *Morales Carrion,* 578 F.2d 447, 451 (1st Cir. 1978), *Hill* v. *Trustees of Indiana University,* 537 F.2d 248, 252 (7th Cir. 1976); *Mahavongsanan* v. *Hall,* 529 F.2d 448, 450 (5th Cir. 1976); *Winnick* v. *Manning,* 460 F.2d 545, 550 (2d Cir. 1972); *Bates* v. *Sponberg,* 547 F.2d 325 (6th Cir. 1976); *Wilkenfield* v. *Powell,* 577 F.Supp. 579, 583 (W.D. Tex. 1983); *Jones* v. *Board of Governors of University of North Carolina,* 557 F.Supp. 263, 265-270 (W.D. N.C.), *aff'd,* 704 F.2d 713 (4th Cir. 1983); and *Edwards* v. *Board of Regents of Northwest Missouri State University,* 397 F.Supp. 822, 830 (W.D. Mo. 1975).

The retest or "second chance" rule, which is the heart of the Sixth Circuit's analysis, was created by Ewing solely through statistical evidence. J.A. 107-112, 119-120. This court has cautioned, however, that "[n]o matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution." *Connecticut Board of Pardons* v. *Dumschat,* 452 U.S. 458, 465 (1981).

The reason for the cautionary logic of *Dumschat* respecting statistics is demonstrated in this case. Ewing's clever statistics combine the records of both Inteflex and standard students; but the Medical School faculty evaluates these two groups of students separately. J.A. 36; DX 35-40. Further, the statistics do not reflect the records of 19 Inteflex students who were dismissed from the petitioner's Medical School prior to receiving even a single opportunity to sit for the NBME Part I examination. J.A. 165-166. Nor do they reflect the fact that, among the eight Inteflex students who failed the NBME Part I on the first occasion, Ewing was only one of two who were on academic warning. The other student suffered an epileptic seizure during the examination, and because of such extenuating circumstances was naturally allowed a retest. (Deposition of Robert E. Reed, M.D., at 168-169.) Ewing, on the other hand, was unable to present any extenuating circumstances to explain his failing performance. Therefore, he was not "similarly situated" with 39 other students. Rather, he was the only Inteflex student to ever fail the NBME Part I examination while on academic warning and without extenuating circumstances. J.A. 35.

Even if Ewing's legal claim were correct, and the University's failure to follow its own rule formed the basis of a § 1983 claim for violation of substantive due process, he has failed to refute material facts on which the trial court relied in finding that no such rule was applicable to his particular situation. Pet. App. at 26a-27a. Since a district court's factual findings may not be set aside unless "clearly erroneous", *Pullman-Standard* v. *Swint,* 456 U.S. 273, 287 (1982), the Sixth Circuit reversal was improper.

D. Judicial Review Of The Substance Of Academic Decisions Is Not Wise Policy.

The exhibits and testimony received by the trial court illuminate a surfeit of safeguards designed by the Medical School to insure against erroneous academic decisions. They provide more than ample protection against the dismissal of a qualified student—even one who has invested time, energy and money in pursuit of a goal formulated perhaps in childhood.

Although Ewing did not accept the many invitations of the Dean's office to come in and discuss his problems (J.A. 144, 145, 146), he took advantage or had the benefit of nearly every safeguard afforded by the system. J.A. 76, 78. The Sixth Circuit ignored these factors in reversing the district court and in accepting Ewing's claim that he was denied substantive due process because he was the first student to be denied two chances at passing the NBME Part I examination. Ignoring Ewing's troubled academic record, the lower court failed to note that Ewing had failed many other examinations, some with the lowest grade in his class, was on academic warning when he sat for the NBME Part I examination, and that many other students were not allowed to sit for the examination even once. J.A. 165.

It is very easy to pass a student but very difficult to fail one.[23] Only professional medical educators can say at what point it becomes clear that a particular student

[23] This aphorism is simply illustrated by comparing the manner in which the Sixth Circuit "passed" Ewing, with the obvious time and care expended by the district courts in "failing" the medical students bringing suit in *Watson* v. *University of South Alabama College of Medicine,* 463 F.Supp. 720 (S.D. Ala. 1979), and in *Stoller* v. *College of Medicine,* 562 F.Supp. 403 (M.D. Pa. 1983).

is in such serious academic trouble as to support the decision to terminate that student's medical education. That decision, whether made in a student's first or last year of medical school, remains a decision solely within the province and competence of professional medical school educators.

Chief Judge Feikens, in discussing the meaning of *Horowitz* during the waning moments of the trial in this case, a trial which sorely diverted the talents of the Medical School faculty for many days, pondered aloud whether judges should ever reverse procedurally correct academic decisions, even if they are "dead wrong" substantively. J.A. 93. As stated by another trial judge, also in interpreting *Horowitz,* "there is a difference between a decision that is mistaken and one that is patently arbitrary and capricious—for example, one that is based upon constitutionally impermissible grounds." *Kohler* v. *Hirst,* 460 F.Supp. 412 (E.D. Va. 1978).

Petitioner believes in and contends for such a rule. Judges should never indulge in a substantive review and reversal of academic decisions. Judicial notions of what is or is not arbitrary and capricious can never substitute for the painstaking decision of a professional educator. Even where a student claims that an academic decision is discriminatory on the basis of race, sex or other unlawful motive, courts should limit any substantive review solely to the inquiry whether there is any independent basis for the underlying *academic* decision. Thus, if the decision to dismiss a medical student is "essentially academic", inquiry into its substance should be concluded. *Jansen* v. *Emory University,* 440 F.Supp. 1060, 1063 (N.D. Ga. 1977) (dental

student). Any other rule will invite disaster in the American educational system, "for while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 160 (1963).

If we wish for ourselves the best kind of educational system possible we will leave that system alone. The kind of teachers who fire up a student, the kind you remember all your life, *the kind who evaluated Scott Ewing in this case,* are not the kind who will survive in a society which allows their judgment to be second-guessed by judges.

CONCLUSION

Based upon the foregoing argument and authorities, the judgment of the court of appeals should be reversed.

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